MOHD ASRI AHMAD

v.

PP

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CRIMINAL APPEAL NO: MT1-41-09-04]
2 AUGUST 2005

CRIMINAL PROCEDURE: *Plea of guilty - Salutary practice of magistrates - Whether safeguards contained in s. 173(b) Criminal Procedure Code complied with - Whether plea valid and unequivocal*

CRIMINAL PROCEDURE: *Sentence - Factors determining severity of sentence - Whether sentence manifestly excessive - Whether appellate interference justified*

The accused (a drug dependant detained under the Drug Dependants (Treatment and Rehabilitation) Act 1983 (the Act)) had escaped from the Serenti Centre Tampin and was charged with an offence under s. 19(1)(b) of the Act. When the accused appeared in person for the first time, the charge was read and explained to him, whereof he informed the court that he understood the charge, wished to plead guilty and understood the nature and consequences of his plea. When the matter was called up again for facts and sentence, the same procedural steps were repeated. Thereafter the facts tendered by the prosecution were read and explained to the accused who understood the facts and admitted same as correct. Only after this, the court had accepted the accused's guilty plea and convicted the accused. Thereafter, the accused pleaded in mitigation and asked the court to impose a fine. The accused also requested for a postponement if a fine was not allowed. The learned magistrate convicted the accused and sentenced him to 14 months' imprisonment and one stroke of the rotan. The accused appealed. Learned counsel for the accused submitted that the accused's guilty plea was conditional and equivocal because the accused had requested for an adjournment if a fine was not allowed. It was also argued that the sentence was manifestly excessive.

Held (dismissing the appeal):

[1] Section 173(b) contains built-in safeguards to the accused who wishes to plead guilty. The safeguards had been meticulously complied with and so the court was unable to hold that the accused's plea of guilty was conditional. The plea was valid and unequivocal. (pp. 407 f & 408 b)

[2] The learned magistrate has imposed the sentence after taking into account the plea of guilty, the mitigating factors, the nature of the offence, public interest and most importantly, the previous convictions of the accused. The sentence imposed on the accused was not manifestly excessive. There was no error to justify appellate interference. (p. 409 b-c & d)

Case(s) referred to:
Koh Mui Keow v. Regina [1952] 18 MLJ 214 ***(refd)***
Lee Weng Tuck & Anor v. PP [1989] 2 MLJ 143 SC ***(refd)***
Lee Yu Fah & Ors v. PP [1937] 6 MLJ 179 HC ***(refd)***
Melvani v. PP [1971] 1 MLJ 137 ***(refd)***
Mohd Dalhar Redzwan & Anor v. Datuk Bandar Dewan Bandaraya Kuala Lumpur [1995] 2 CLJ 209 CA ***(refd)***
Mohammad Hassan v. PP [1997] 1 CLJ 485 HC ***(refd)***
New Tuck Shen v. PP [1982] CLJ 38 HC; [1982] CLJ (Rep) 606 HC ***(refd)***
PP v. Shari Mohd Sharif [2005] 5 CLJ 439 HC ***(refd)***
Sau Soo Kim v. PP [1975] 2 MLJ 134 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 173(b), 305
Drug Dependants (Treatment and Rehabilitation) Act 1983, ss. 3(1), 4(1)(b), 19(1)(b)(3)
Panel Code, s. 324

For the prosecution - Abdul Rashid Hj Daud; DPP
For the appellant - Markhan Singh; M/s Mohd Latip & Assoc

Reported by Amutha Suppayah

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal by the appellant-accused ("the accused") against the decision of the learned magistrate who had on 24 August 2004 convicted the accused of an offence under s. 19(1)(b) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ("the Act") and sentenced him to 14 months imprisonment and one stroke of the rotan under s. 19(3) of the Act.

The Charge

The charge preferred against the accused reads as follows:

> Bahawa kamu diantara jam 8.00p.m. hingga 9.40p.m. 25 April 1999 di Pusat Serenti Tampin, Pulau Sebang, di dalam daerah Alor Gajah, di dalam negeri Melaka, sebagai seorang penagih dadah yang ditahan dengan sahnya disisi undang-undang dibawah s. 6(1)(a) Akta Penagih Dadah (R&P) 1983 didapati kamu telah melarikan diri dari Pusat tersebut. Oleh yang demikian kamu telah melakukan kesalahan dibawah s. 19(1)(b) APD (R&P) 1983 dan boleh dihukum dibawah s. 19(3) Akta yang sama.

[My Translation:

That you between 8.00p.m. and 9.40p.m. on 25 April 1999 at Serenti Centre Tampin, Pulau Sebang, in the district of Alor Gajah, in the state of Melaka, as a drug dependant lawfully detained under s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 was found to have escaped from the Centre and you have thereby committed an offence under s. 19(1)(b) of the Act and punishable under s. 19(3) of the same Act.]

Pleading Guilty

The accused had pleaded guilty to the charge.

The notes of proceedings and grounds of decision show that on 17 July 2004, the accused appeared in person for the first time. When the charge was read and explained to him, he informed the court that he understood the charge, to which he wished to plead guilty and that he understood the nature and consequences of his plea.

At the request of the prosecution, the court adjourned the case to 24 August 2004 for facts and sentence. On 24 August 2004, the same procedural steps were repeated. Thereafter the facts tendered by the prosecution were read and explained to the accused who understood those facts which he also admitted as correct.

It was only after the completion of all these procedural steps that the court had accepted the accused's guilty plea and convicted the accused. The notes of proceedings show that the accused's guilty plea was voluntary and without any compulsion.

Thereafter, the accused pleaded in mitigation in the following words:

> Saya telah berkahwin, ada tiga anak dan masih bersekolah. Isteri tidak bekerja. Pohon dikenakan denda. Isteri sedang mengandung dua bulan. Tiada lagi. Pohon tangguh hukuman jika tidak dibenarkan denda. Tiada lagi.

[My translation:

I am married with three school-going children. My wife is not working. Pray that a fine be imposed. My wife is currently two months pregnant. That's all. Pray for postponement if the fine is not allowed. That's all.]

Learned defence counsel Mr. Markhan Singh submitted that the accused's guilty plea is conditional and equivocal in view of the accused's request for postponement if the fine was not allowed. He added that the appeal record did not show that the court had informed the accused that the fine was not allowed and imprisonment would be imposed, so that the accused could reconsider on his guilty plea, and that as a result, the conviction was wrong in law, relying on *Lee Yu Fah & 5 Ors v. Public Prosecutor* [1937] 6 MLJ 179 HC;

Lee Weng Tuck & Anor v. Public Prosecutor [1989] 2 MLJ 143 SC; *Mohammad bin Hassan v. Public Prosecutor* [1997] 1 CLJ 485 HC; and *Koh Mui Keow v. Regina* [1952] 18 MLJ 214.

Learned deputy public prosecutor Mr. Abdul Rashid bin Hj. Daud contended that the learned magistrate had complied with s. 173(b) of the Criminal Procedure Code ("CPC") and the judgment in *Lee Weng Tuck, supra*, and that the accused's guilty plea is not a conditional one.

In my judgment, it is trite law that under s. 305 of the CPC, a person who has been convicted on his plea of guilty is entitled to appeal only against the extent or legality of the sentence, but once the appeal has been lodged, he is not prevented from contending that the conviction was illegal and requesting the judge to act in revision, as the judge is entitled to do so: per Gopal Sri Ram JCA delivering the majority judgment of the Court of Appeal in *Mohd Dalhar Bin Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 2 CLJ 209 CA; *Lee Yu Fah, supra*; and *Mohammad bin Hassan, supra*.

This brings me to the question as to whether the accused's plea of guilty is a conditional one.

The answer to this question may be ascertained by reference to s. 173(b) of the CPC which reads:

> If the accused pleads guilty to the charge, whether as originally framed or as amended the plea shall be recorded and he may be convicted thereon:
>
> Provided that before a plea of guilty is recorded the court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

In my judgment, s. 173(b) contains built-in safeguards to the accused who wishes to plead guilty to a charge in court.

These safeguards have been succinctly set out by the then Supreme Court in *Lee Weng Tuck, supra*, where one of the main issues was whether the appellant's plea was unequivocal. In delivering judgment of the court, Mohamed Azmi SCJ (as he then was) at p. 1471 left to A right held, *inter alia*, as follows:

> A plea of guilty must be valid and unequivocal, and in order to determine the validity of a plea of guilty, the safeguards which must be followed might be stated as follows:
>
> (i) The court must ascertain that it is the accused himself who wishes to plead guilty.

(ii) The court must ascertain that the accused understands the nature and consequences of his plea.

(iii) The court must ascertain that the accused intends to admit without qualification the offence alleged against him;

Applying s. 173(b) and the above judgment of the Supreme Court to the notes of proceedings recorded by the learned magistrate, there can be no doubt in my mind that the safeguards have been meticulously complied with and so I am unable to hold that the accused's plea of guilty is conditional. In my view, the learned magistrate has taken every procedural step to ensure that that plea was valid and unequivocal.

Whether a guilty plea was valid and unequivocal was a question of mixed law and fact but the validity of the plea must first be established before the plea could be said to be unequivocal: *Lee Weng Tuck, supra,* p. 148A-B.

The appellants in *Lee Weng Tuck, supra,* had originally claimed trial to a capital case but subsequently indicated that they wished to change their plea. A third accused had claimed trial. The trial judge accepted the pleas of guilty and convicted them, but had adjourned the case for sentence. At the resumed hearing, the appellants applied to withdraw their plea of guilty and gave their reasons, but the trial judge refused to allow the appellants to change the plea and sentenced them to death. The Supreme Court held that there were reasons which gave rise to a reasonable doubt as to the validity and unequivocality of the guilty plea due to a failure to take proper safeguards, then the court has no discretion but to permit the accused to retract his plea.

Another illustration may be found in the case where the charge was neither read nor explained to the accused and the court is not satisfied that the accused has understood and admitted each and every allegation in the charge to which she has pleaded guilty, as in *Koh Mui Keow, supra,* in which case Brown J. ordered a retrial.

In my view, the facts in the above two authorities are substantially different from those in the instant appeal and so they are of no assistance to the accused herein.

In the circumstances, I am unable to accept the defence contention that the accused's plea of guilty is a conditional one. Instead, I hold that it is a valid and unequivocal plea.

Sentence

The defence took the view that the sentence is manifestly excessive as the imprisonment term is not mandatory and the court below has not considered the mitigation plea in the exercise of the discretion.

The learned deputy did not subscribe to that view and urged the court not to interfere with the sentence.

My perusal of s. 19(3) of the Act reveals that the sentence allowable thereunder is a term of imprisonment not exceeding five years or whipping not exceeding three strokes or both.

The learned magistrate has imposed the sentence after taking into account the plea of guilty and all the above mitigating factors, and has referred to *Sau Soo Kim v. Public Prosecutor* [1975] 2 MLJ 134; and *Melvani v. Public Prosecutor* [1971] 1 MLJ 137.

In my view, the court below has had due regard to the nature of the offence, public interest, and most importantly, the previous convictions of the accused *viz* two under s. 4(1)(b) and s. 3(1) both of the same Act, for which he had been sent to the Serenti Centre for two years respectively. The third offence was for causing hurt with a dangerous weapon under s. 324 of the Penal Code and the sentence meted out was six months' imprisonment.

Given the facts of the case and the antecedents of the accused, I hold that the learned magistrate has acted on correct principles. The sentence imposed on the accused is not manifestly excessive. There is no error to justify appellate interference: See *New Tuck Shen v. Public Prosecutor* [1982] 1 MLJ 27, 31D-E right HC, and *PP v. Shari Mohd Sharif* [2005] 5 CLJ 439, 449a-c HC.

Conclusion

On the foregoing grounds, I dismiss this appeal and affirm the decision of the court below.